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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-822

CLARA RUTH TAYLOR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reason for Granting Writ	4
Conclusion	6
Appendix	A-1

List of Authorities Cited

Brady v. Maryland, 373 U.S. 87 (1963)	5
Giglio v. United States, 405 U.S. 150 (1971)	5
Napue v. Illinois, 360 U.S. 103 (1959)	5
United States v. Keogh, 391 F.2d 138 (1968)	5

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Clara Ruth Taylor, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered on the 20th day of October, 1976, in the cause pending therein entitled *United States of America v. Clara Ruth Taylor*, No. 76-1282, as well as denial of Petitioner's Application for Rehearing entered on November 16, 1976.

OPINION BELOW

The District Court for the Eastern District of Missouri rendered no opinion.

The opinion of the Court of Appeals denying Petitioner's Appeal is not yet officially reported, but Petitioner has attached a copy of said opinion herein.

JURISDICTION

The judgments of the Court of Appeals for the Eighth Circuit were made and entered on October 20, 1976. The order of the Court of Appeals for the Eighth Circuit denying Petition of Clara Ruth Taylor for Rehearing was entered on November 16th, 1976. Copies of the opinion and order are appended to this Petition. The jurisdiction of this Court is invoked under Title 28, U.S.C. section 1254(1).

QUESTIONS PRESENTED

Does the fact that the prosecution withheld readily available and specifically requested information until the morning of trial when such information was necessary for the defense attack on the credibility of a key government witness constitute sufficient grounds for the appellate court to apply the *Brady* rule as to suppression of evidence instead of the more lenient standard relating to the trial judge's discretion to deny or grant a motion for continuance.

STATEMENT

Petitioner is an individual who was charged with two counts of distribution of heroin in violation of Title 21, United States Code, Section 841(a)(1). The trial in this matter was set for the morning of March 15, 1976. Prior to trial the District Court granted Petitioner's motions of February 17th for favorable and exculpatory evidence by order dated March 4th, 1976, even though the Government's response to said motions was that it did not have any favorable or exculpatory evidence. On March 9th, 1976, the District Court, granting Petitioner's motions of March 8th, ordered the Government to produce any agreement

between the Government and prosecution witnesses as well as to reveal the identity of the Government's confidential informant.

On March 15th, 1976, at the time the case came to trial, the Government disclosed that the informant, Doward, was to testify at trial. Additionally, the Government disclosed that Doward was being paid by the Government for his assistance in the prosecution of heroin cases. Upon receiving this information, defense counsel moved for a continuance on the ground that the information just supplied was needed to prepare the defense. This motion was denied and the cause went immediately to trial. The trial of Petitioner was in the United States District Court for the Eastern District of Missouri. The jury returned a verdict of guilty on both counts. The court rendered a judgment and pronounced sentence in accordance with the verdict. The court sentenced Petitioner to the custody of the Attorney General for fifteen years on Count I and ten years on Count II, such terms to run concurrently.

Petitioner duly perfected her appeal to the Eighth Circuit Court of Appeals and after filing briefs, the case was submitted on briefs on September 13th, 1976. On October 20th, 1976, the Eighth Circuit affirmed Petitioner's conviction. (Copy attached) Petitioner filed her Motion for Rehearing with the Eighth Circuit on November 2nd, 1976. On November 16th, 1976, Petitioner's Motion for Rehearing was denied.

REASON FOR GRANTING WRIT

The decision below should be reviewed because it fails to apply the correct standard on review to the issue of whether Petitioner was denied a fair trial.

The factual pattern in this case involves a paid Government informant with an extensive criminal record. This informant testified at trial for the Government; as the trial record and the Eighth Circuit's statement of the facts disclose, this testimony was key to the Government's case against Petitioner. Petitioner testified at trial. Her version of the narcotics transactions in question was in direct contradiction to that of the informant-witness. The credibility of the informant was, therefore, determinative to the jury's verdict concerning Petitioner's guilt or innocence.

The United States Court of Appeals for the Eighth Circuit applied the incorrect standard in its review of this action when it applied the standard relating to the trial judge's discretion to grant or deny continuances. In part, this error was predicated on a misinterpretation of the facts of this case in light of the Supreme Court's prior ruling.

The Eighth Circuit stated:

> "The memorandum related only to the identity of the Government informant, Doward, and detailed certain matters which tended to affect Doward's credibility. The Government made a complete and candid disclosure of all information bearing upon this subject. The record shows that Taylor's counsel ably conducted himself at trial and used the information released in the memorandum to Taylor's benefit." *United States v. Taylor*, No. 76-1282 (8th Cir., Oct. 20, 1976).

This Court has clearly held that the deliberate suppression of material evidence by the prosecution violates the Defendant's

constitutional right to a fair trial. *Giglio v. United States*, 405 U.S. 150 (1971); *Brady v. Maryland*, 373 U.S. 87 (1963); *Napue v. Illinois*, 360 U.S. 103 (1959). Deliberate suppression has been defined by the Second Circuit Court of Appeals as not only the considered decision to suppress for the purpose of obstructing, but also the failure to reveal information whose high probative value could not have escaped the prosecutor's attention. *United States v. Keogh*, 391 F.2d 138 (1968). The prosecutor in this case was, if for no other reason, made aware of the high probative value of the withheld information by virtue of the Defendant's specific request for such information. The information, because it went to the credibility of a key Government witness who was an informant, was material to the question of Petitioner's guilt or innocence. *Napue v. Illinois, supra; United States v. Keogh, supra.*

The prosecution's suppression of specifically requested material evidence until the morning of the trial in this case was unjustified and constituted bad faith suppression. The proper standard for review of a conviction in such situations is whether the suppressed evidence could in any reasonable likelihood have affected the judgment of the jury. *Giglio v. United States, supra.* This is a low threshold which reflects this Court's interest in deterring prosecutorial misconduct undermining the integrity of the judicial system as well as protecting the defendant's right to a fair trial.

The Petitioner met the threshold showing in this case, and therefore, merited a lower standard on the review of her conviction and a new trial. Because the Government's entire case was centered on the testimony of Doward, the defense counsel's attempt to undermine his credibility was of central importance. That counsel's attempt to undercut Doward's reliability as a witness was impaired by not timely receiving the requested information in question for purposes of evaluating and developing for presentation at trial is clear. While defense counsel was pro-

vided this information at the last moment, and he was able to attempt to present it at trial, he was precluded from meaningfully conducting the kind of adequately prepared defense to which Petitioner was entitled. This conclusion is premised on the fact that a reasonable time before trial is necessary to prepare a meaningful defense; and, whereas here the preparation would have gone to information directly material to the credibility of the key Government witness, it could have directly affected the jury's judgment. Defense counsel was not given this opportunity to adequately prepare in this case, however, because the Government failed to reveal the information within a reasonable time of the specific request.

It is Petitioner's contention that the Court of Appeals in this action failed to apply the correct standard of review and that this Court's review of the decision would present an opportunity to clarify this question for the lower courts.

CONCLUSION

For the above stated reasons a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Court of Appeals
for the Eighth Circuit

No. 76-1282

United States of America, Appellee,

v.

Clara Ruth Taylor, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 13, 1976

Filed: October 20, 1976

Before Gibson, Chief Judge, Markey,* and Stephenson, Circuit Judge.

Per Curiam.

Defendant, Clara Taylor, appeals from her conviction on two counts of illegally distributing heroin in violation of 21 U.S.C. § 841(a)(1) (1970). Taylor was sentenced to 15 years in prison to be followed by a five year special parole term.

The Government's evidence was that on December 1, 1975, a Government informant, Arthur Doward, arranged for the purchase of heroin from Taylor. Pursuant to this arrangement, Taylor arrived at Doward's house where Doward and D.E.A. agent Luss were waiting. Upon arrival Doward and Taylor retired to the kitchen where Taylor inquired as to whether Doward was in possession of a prearranged sum of money.

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* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

Doward replied in the affirmative. Taylor then left the house and, upon her return, removed two containers of heroin from her bra. The heroin was measured by Doward and Luss. Doward then placed $3,600 in $20 and $50 bills on the table. As he was leaving the room, Luss observed Taylor depositing the money in her bra.

On December 11, 1975, Taylor once again returned to Doward's residence. While in the house, Taylor removed a tinfoil package of heroin from her purse and placed it on a table before Luss.

Taylor testified in her own behalf and contradicted the Government's proof in regard to these two transactions. She stated that on December 1 it was Doward who produced the two containers of heroin from a refrigerator in the kitchen. On December 11 she contended that Doward planted the heroin on her as she was entering the house. The jury disbelieved this testimony and convicted Taylor on both counts.

Taylor's primary contention on this appeal is that the District Court erred in denying Taylor's motion for a continuance in light of the Government's failure to disclose material evidence to Taylor until the day of the trial. On February 17, 1976, Taylor moved the District Court to issue an order to compel the Government to permit discovery of certain evidence pursuant to Fed. R. Crim. P. 16 and to produce all favorable evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). This motion was granted on March 4, 1976. On March 9, 1976, the District Court issued another order requiring the Government to reveal any agreement between the Government and any prospective witness which could conceivably influence that witness's testimony. The Government was also ordered to identify the confidential informant used in this case.

On the morning of March 15, 1976, the date of Taylor's trial, the Government provided Taylor with a memorandum of

disclosure. This memorandum advised Taylor that Arthur Doward would be summoned as a Government witness. The memorandum also provided that Doward had previously been convicted of a narcotics offense and that his sentence for that conviction had been reduced because of his agreement to cooperate with the Drug Enforcement Administration in the investigation of narcotics offenses. Pursuant to this agreement, Doward cooperated with the D.E.A. and received $600 for information he provided to the D.E.A. The memorandum specified that, for Doward's assistance in the Taylor case, D.E.A. agents would "apply to the appropriate Government agency for a cash reward" for Doward. Finally, the memorandum provided that as of March 12, 1976, Doward had been accepted into the United States Marshals' Witness Protection Program.

Upon receiving this information, Taylor filed a motion for continuance on the basis that Taylor's counsel needed to review this material and seek further facts on this subject to adequately prepare the defense. The District Court denied the motion and the case proceeded to trial.

Taylor contends that the District Court erred in denying the motion for continuance because the Government's late disclosure of the material prejudiced Taylor and rendered the trial unfair. Whether a continuance should be granted or not rests in the sound discretion of the District Court and only a showing of a clear abuse of discretion will justify an overturning of the District Court's ruling. *United States v. Webb*, 533 F.2d 391, 395 (8th Cir. 1976). In the present case, we fail to find that the District Court abused its discretion since there has been no showing that Taylor was hampered in her preparation for trial. The late disclosure of the Government's memorandum did not in any respect inhibit or prejudice Taylor's ability to marshal exculpatory facts at the pretrial stage. Taylor's counsel had sufficient time between the indictment and trial to investigate the facts and circumstances surrounding the heroin transactions in

this case and to obtain testimony bolstering Taylor's theory of the transactions. The memorandum related only to the identity of a Government informant, Doward, and detailed certain matters which tended to affect Doward's credibility. The Government made a complete and candid disclosure of all information bearing upon this subject. The record shows that Taylor's counsel ably conducted himself at trial and used the information released in the memorandum to Taylor's benefit. *Cf. Tasby v. United States*, 451 F.2d 394, 399 (8th Cir. 1971), *cert. denied*, 406 U.S. 922 (1972). When Doward was called as a Government witness, he was subjected to extensive cross-examination in regard to both his involvement in the Taylor heroin transaction and the nature of his agreements with the Government. The matter was fully ventilated before the jury and Taylor has failed to show what favorable evidence would conceivably have been secured if a continuance had been granted. *See United States v. Roca-Alvarez*, 451 F. 2d 843, 847 (5th Cir. 1971). The Government's late release of information of this nature under the facts of this case did not entitle Taylor to a continuance.[1]

Taylor also contends that the District Court erred in refusing to order the Government to produce the criminal records of all Government witnesses. This contention is without merit since

[1] Taylor raises a subsidiary, yet related, issue that the Government's belated disclosure of the material relating to Doward constituted a violation of the principles of *Brady v. Maryland, supra*. The *Brady* rule provides that Government suppression of material evidence favorable to the defendant denies defendant due process of law. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). In light of the fact that the Government made a complete pretrial disclosure of facts to Taylor in this case, we are unable to say that there was a "suppression" of evidence as contemplated by *Brady*. We are not intimating that an unjustified last-minute and incomplete disclosure of crucial evidence which demonstrably prejudices the defendant in the preparation of his case would not violate *Brady*. That type of situation is not before us in this case and we express no view of the merits of such a claim. Under the facts of this case, there was no suppression of exculpatory evidence.

this court has ruled that the criminal records of such witnesses are not discoverable. *Hemphill v. United States*, 392 F.2d 45, 48 (8th Cir.), *cert. denied*, 393 U.S. 877 (1968). The legislative history accompanying the recently amended Federal Rules of Criminal Procedure indicates that the *Hemphill* rule is intact. The House of Representatives, in considering the proposed amendments to the Federal Rules of Criminal Procedure, approved proposed Rule 16(a)(1)(E) which would have entitled defendants to discover all criminal convictions of the Government witnesses. H.Rep. No. 94-247, 94th Cong., 1st Sess. 15 (1975), *reprinted in* 2 U.S. Code Cong. & Admin. News 687 (1975). However, the Senate rejected this provision and the House and Senate conferees adopted the Senate position and deleted proposed Rule 16(a)(1)(E). H.Conf.Rep. No. 94-414, 94th Cong., 1st Sess. 12 (1975), *reprinted in* 2 U.S. Code Cong. & Admin. News 716 (1975). Therefore, the District Court properly denied Taylor's request to discover the conviction records of the Government witnesses. As to the informant Doward, his criminal record was fully discussed on both direct and cross-examination at trial, and thus Taylor can claim no prejudice in the District Court's refusal to order disclosure of Doward's criminal record before trial.

The judgment of conviction is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT